

The opinion in support of the decision being entered today
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID SHAVER and JEAN M. FOISSAC

Appeal 2007-3313
Application 10/789,444
Technology Center 3600

Decided: September 17, 2007

Before DEMETRA J. MILLS, ERIC GRIMES, and RICHARD M.
LEBOVITZ, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-10, the only
claims pending in this application. We have jurisdiction under 35 U.S.C. §
6(b).

Pending claims follow.

1. A method for growing a plant comprising the steps of:
planting said plant in a growth medium;
twisting at least two plant vines of said plant together to form a growing unit; and
maintaining said growing unit during the growth and production cycles of said plant.
2. The method of claim 1 wherein said maintaining step comprises the step of:
securing one end of a flexible material at the base of said plant.
3. The method of claim 1 wherein said twisting step comprises the step of:
twisting said at least two plant vines together around a flexible material.
4. A yield maximization system comprising:
a growth medium for sustaining the growth of a plant, said plant having vines growing from a single root system; and
supports for twisting at least pairs of said vines around individual ones of said supports.
5. The yield maximization system of claim 4 wherein said supports comprise:
a flexible material having one end tied around the base of said plant and the opposite end supported above said vines.
6. A method for growing a plant, said method comprising:
twisting at least two plant vines of said plant around a flexible material; and
securing said flexible material, wherein said at least two plant vines are twisted vertically around said flexible material.
7. The method of claim 6 wherein said flexible material comprises string.
8. The method of claim 6 wherein said flexible material comprises a rod.
9. A method for growing a plant comprising:

planting a plant in a growth medium, wherein plant vines are produced from said plant; and
attaching at least a pair of said plant vines to one another with a flexible material, wherein said at least a pair of said plant vines are twisted together around said flexible material.

10. The method of claim 9, wherein said attaching step comprises:
securing one end of said flexible material at the base of said plant; and
securing the opposite end of said flexible material at a height taller than said plant.

Cited References:

Hop Picking Year (Hop)

Gillet (translation)¹ FR 2797559 Feb. 23, 2001

Reference cited by Merits Panel

Tillinghast US 155,995 Oct. 13, 1874

Grounds of Rejection

Claims 1, 3, 4, and 6-9 stand rejected under 35 U.S.C. § 102(b) as anticipated by Hop.

Claims 2, 5 and 10 stand rejected under 35 U.S.C. § 103(a) as obvious over Hop in view of Gillet.

¹ The Examiner refers to this publication as Gaudru. The merits panel will refer to this publication as Gillet.

DISCUSSION

Anticipation

Claims 1, 3, 4, and 6-9 stand rejected under 35 U.S.C. § 102(b) as anticipated by Hop.

The Examiner finds that

Hop teaches a method for growing a plant comprising planting the plant in a growth medium (can be seen from the pictures); twisting at least two plant vines of the plant together to form a growing unit (see pictures, especially "Mrs Baldock-Apps Thirthing" two vines in the middle are twisted on the string, each hop plant includes a plurality of vines and two vines are to be support by a string, see article); and maintaining the growing unit during the growth and production cycles of the plant.

(Final Rejection 3.)

Appellants contend that Hop does not qualify as a printed publication as the document was not disseminated or otherwise made available to the extent that persons interested can locate it. (Br. 4.) Thus, Appellants argue the examiner has not made a sufficient showing that the document qualifies a printed publication. (Br. 5.)

We agree with Appellants that the examiner has not established that Hop qualifies as a printed publication and thus is not prior art to the present application. Hop states on page 2 that it was published in Summer of 1961 in the publication *Guinness Time*. The examiner referenced this publication through a website. The reference page for this website shows the earliest website update to be May 9, 2004, which is after Appellant's filing date of Feb. 27, 2004. Appellants argue that if *Guinness Time* is a publication disseminated by mail, that it is not prior art until it is received by at least one

member of the public. (Br. 5, citing *In re Schlittler*, 234 F.2d. 882 (CCPA 1956)). We have no evidence before us as to the date of receipt of *Guinness Time* by a member of the public; e.g., reference of receipt by a public library as is customary in showing receipt of a printed publication by a member of the public. Appellants further argue that a search for the publication, *Guinness Time* was made and did not reveal the existence of such a publication. (Br. 5.) When Appellant alleged there was no evidence that *Guinness Time* qualified as a printed publication, the Examiner failed to rebut this argument providing evidence showing receipt of the *Guinness Time* publication by a member of the public.

It would reasonably appear from the weight of the evidence that Appellants have made an argument unrebutted by the Examiner that *Guinness Time* is not a printed publication. We find that Hop is not prior art to the present application on the evidence before us.

The anticipation rejection is reversed.

Obviousness

Claims 2, 5 and 10 stand rejected under 35 U.S.C. § 103(a) as obvious over Hop in view of Gillet. As discussed above, Hop is not prior art with respect to the present application.

The obviousness rejection is reversed.

New Grounds of Rejection

Under the provisions of 37 C.F.R. § 41.50(b), we enter the following new grounds of rejection.

Anticipation

Claims 1 and 4 are rejected under 35 U.S.C. § 102(b) as anticipated by Tillinghast. Tillinghast discloses a method of growing a plant such as a grape vine by cutting down vines and only allowing two branches to grow. The vine branches are trained spirally around a stake, meeting the limitation of claim 1 of “twisting at least two plant vines of said plant together to form a growing unit.” (Tillinghast, col. 1.) Such training is stated to check too rapid growth in the main branches and thereby cause better development of the first spurs. Tillinghast acknowledges that strings were used in the prior art but proposes the use of nails to hold the vines with less injury to the plant. (Tillinghast, col. 2.)

Obviousness

Claims 2, 3 and 5-10 are rejected under 35 U.S.C. 103(a) as obvious over Tillinghast in view of Gillet.

As to claim 2, Tillinghast discloses a method of growing a plant such as a grape vine by cutting down vines and only allowing two branches to grow. The vine branches are trained spirally around a stake. (Tillinghast, col. 1.) Gillet discloses a method for growing a plant comprising securing one end of a flexible material 4 (string) at the base of the plant. Figure 1, element 12, wherein the string is attached to the base of the plant via a knot. (Gillet 7.) Gillet also indicates that its flexible stake system can accommodate two or four tomato stalks, depending on the number of cross

pieces added to the stake system. (Gillet 4.) It would have been obvious to one of ordinary skill in the art to secure more than one vine from a single plant to the flexible stakes of Gillet in view of the disclosure of Tillinghast that multiple vines from a single plant can be trained around a single stake and in further view of the fact that the stakes of Gillet can accommodate two to four tomato stalks from separate plants.

As to claims 3, 6, 7, and 9, Gillet discloses attaching two to four tomato stalks from multiple plants to twine-type stakes made of flexible material. (Gillet 3, 6.) It would have been obvious to one of ordinary skill in the art to secure more than one vine from a single plant to the flexible stakes of Gillet in view of the disclosure of Tillinghast that multiple vines can be trained around a single stake.

As to claims 5 and 10, Gillet discloses, in Figure 1, a string tied around the base and opposite end of tomato vines. Figure 1 also shows securing the string at a height taller than the plant. It would have been obvious to one of ordinary skill in the art to secure more than one vine from a single plant to the flexible stakes of Gillet in view of the disclosure of Tillinghast that multiple vines can be trained around a single stake.

As to claim 8, Gillet discloses a flexible stake made of steel wire. (Gillet 2.) In view of this teaching, it would have been obvious to one of ordinary skill in the art to substitute a flexible wire or a flexible rod for the wooden stake of Tillinghast to support multiple vines from a single plant as Gillet teaches that a flexible material such as steel wire can act as a stake for plant vines.

CONCLUSION

The anticipation and obviousness rejections are reversed.

Two new grounds of rejection are made under 37 C.F.R. § 41.50(b).

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

REVERSED and § 41.50(b)

dm

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